Supreme Court, U.S.
FILED
JAN 30 1989
JOSEPH F. SPANIOL, JR.
CLERK

(3)

Case No. 88-957

IN THE UNITED STATES SUPREME COURT
TERM: OCTOBER 1988

Vincent S. Toussaint, M.D.,
Petitioner

v

Laurens County Health Care System, Russell Emerson, Edward M. Corley, Walter A. Sigman, W. Paul Culbertson, L. W. McClain, Michael R. Meeks, James L. Walker, Reese Young, James G. Ferguson, W. M. Wiley, individually and in their official capacity as members of the Board of Directors of Bailey Memorial Hospital, and Clem P. Ham, individually and in his official capacity as Administrator of Bailey Memorial Hospital, Akhtar Hussain, M.D., individually and in his official capacity as Chief of the Medical Staff at Bailey Memorial Hospital and as a member of the Executive Committee of Bailey Memorial Hospital, Bruce Marshall, M.D., individually and in his official capacity as a member of the Executive Committee of Bailey Memorial Hospital, Stephen Ramsay, M.D., individually and in his official capacity as a member of the Executive Committee of Bailey Memorial Hospital and as Chief of Service for Pediatrics,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

REPLY TO BRIEF IN OPPOSITION

Larkin Mims
210 North Main Street
Anderson, South Carolina 29621
(803) 224-5006

Attorney of Record for the Petitioner

24 pp

TABLE OF CONTENTS

		Page
1.	Table of Authorities	ii
2.	Questions presented for review . . .	1
3.	Argument	1
	(a) Whether the trial court erred in that the findings of fact are clearly erroneous?.	1
	(b) Whether the trial court erred in concluding that petitioner failed to sustain his causes of action for violations of 42 U.S.C. 1983?	17

TABLE OF AUTHORITIES

Page

Statutes

42 United States Code 1983. . . . . 1, 17

Federal Rules of Civil Procedure

Rule 52 of the Federal Rules of Civil Procedure . . . 1, 2, 5, 6, 7, 8, 9, 10

Cases

1. Anderson v. Bessemer City, 470 U.S. 564, 105 S.Ct. 1504, 84 L.Ed2d 518 (1985) 9, 10
2. Armour Co. v. Celic, 294 F.2d 432 (2nd Cir. 1961). 2
3. Case v. Morrisette, 475 F.2d 1300 (D.C. Cir. 1973) 3
4. Custom Paper Products Company v Atlantic Paper Box Company, 469 F.2d 178 (1st Cir. 1972). 3
5. Daniel v. First National Bank of Birmingham, 228 F.2d 803 (5th Cir. 1956). 2, 3
6. Emmco Insurance Company v. Wallenius Caribbean Line, S.A., 492 F.2d 508 (5th Cir. 1974) . . . 3
7. Inwood Laboratories, Inc. v. Ives Laboratories, Inc., 456 U.S. 844, 102 S.Ct. 2182, 72 L.Ed2d 686 (1982) 7
8. Orvis v. Higgins, 180 F.2d 537 (2nd Cir. 1950). 2
9. Pembaur v. City of Cincinnati, 106 S.Ct. 89, 89 L.Ed2d 452(1986). . . 20
10. Sears, Roebuck & Co. v. Johnson, 219 F.2d 590 (3rd Cir. 1955) . . . 2
11. Surgical Supply Service, Inc. v. Adler, 321 F.2d 536 (3rd Cir. 1963) 2
12. Swanson v. Baker Industries, Inc., 615 F.2d 479 (8th Cir. 1980) . . . 3

TABLE OF AUTHORITIES (Cont.)

Page

13. Thompson v. United States, 477 F.2d 164 (7th Cir. 1973) . . . 3
14. United States v. E. I. DuPont de Nemours & Co., 353 U.S. 586, 77 S.Ct. 872, 1 L.Ed2d 1057(1957). 8
15. United States v. General Motors Corporation, 384 U.S. 127, 86 S.Ct. 1321 (1966) 8, 9
16. United States v. National Association of Real Estate Boards, 339 U.S. 485, 70 S.Ct. 711, 94 L.Ed 1007 (1950). 7
17. United States v. Oregon State Medical Society, 343 U.S. 326, 72 S.Ct. 690, 96 L.Ed2d 978 (1952) 7, 8
18. United States v. Parke, Davis & Co., 362 U.S. 29, 80 S.Ct. 503, 4 L.Ed2d 505(1960) 8
19. United States v. Singer Manufacturing Co., 374 U.S. 174, 83 S.Ct. 1773, 10 L.Ed 2d 823 (1963). 9
20. United States v. United States Gypsum Company, 333 U.S. 364, 68 S.Ct. 525, 92 L.Ed. 746 (1948) 5, 6, 7
21. United States Steel Corporation v. Fuhrman, 407 F.2d 1143 (6th Cir. 1969). 3

QUESTIONS PRESENTED FOR REVIEW

1. Whether the trial court erred in that the findings of fact are clearly erroneous?

2. Whether the trial court erred in concluding that petitioner failed to sustain his causes of action for violations of 42 U.S.C. 1983?

ARGUMENT

1. The trial court erred in that the findings of fact are clearly erroneous.

Respondents erroneously contend that the petition must be denied on this issue on two bases: (1) there is no conflict concerning the scope of review under Rule 52 of the Federal Rules of Civil Procedure and (2) the trial court had the opportunity to evaluate the credibility of the witnesses so its findings should not be disturbed. A 1985 amendment to Rule 52 probably resolved a long standing conflict as to the degree of deference paid to findings based on essentially undisputed facts and/or

documentary evidence. The amendment provides that findings based on oral or documentary evidence shall not be set aside unless clearly erroneous. However, the rule is still qualified by the provision that due regard shall be given the opportunity of the trial court to judge credibility of witnesses. Therefore, when the record consists of essentially undisputed facts presented by oral testimony and documentary evidence, that regard should be either minimized or eliminated. The Second Circuit defined classes of evidence not due such deference. Orvis v. Higgins, 180F.2d537,539-540(2ndCir.1950). See also: Armour & Co. v. Celic, 294F.2d432(2ndCir.1961). The Third, Fifth, Seventh and Eighth Circuits eliminated or minimized such deference. Sears, Roebuck & Co. v. Johnson, 219F.2d590,591(3rdCir. 1955); Surgical Supply Service Inc. v. Adler, 321 F.2d536,539(3rdCir.1963); Daniel v. First National Bank of Birmingham, 228F.2d803(5th

Cir.1956);Emmco Insurance Company v Wallenius Caribbean Line, S.A., 492F.2d508(5thCir. 1974). Swanson v. Baker Industries, Inc., 615F.2d479(8thCir.1980); John R. Thompson v United States, 477F.2d 164(7thCir.1973). Other circuits concluded that the degree of deference never varies. Case v. Morrisette, 475F.2d1300(D.C.Cir.1973); Custom Paper Products Company v. Atlantic Paper Box Company, 469F.2d178(1stCir.1972). The Sixth Circuit noted there was a split among the circuits and within that circuit. United States Steel Corporation v. Fuhrman, 407F.2d1143,1145(6th Cir.1969). The record in this case consists of an appendix of six volumes, more than four of which contain documents (65 plaintiff's exhibits and 11 defense exhibits) which include transcriptions of testimony taken at the hospital peer review proceedings, affidavits admitted as testimony at those proceedings, other documents and less than two appendix

volumes of oral trial testimony of thirty-three plaintiff and five defense witnesses. With few exceptions the chain of events is essentially undisputed. Despite respondents' repeated references to evaluations of credibility and the alleged discharge of Sallie Hunter the only oral trial testimony on whether or not petitioner discharged this patient was petitioner's testimony that he told the nurses the patient could not be held against her will but did not order the nurses to discharge her. The only oral trial testimony on the issue of whether such an alleged discharge violated a generally accepted standard was that of Drs. Pierpont and Holdredge who both testified that such an alleged discharge in that situation was not a violation. All other testimony on these issues was in the documentary record of the hospital proceedings. The trial court drew many inferences, including inferences regarding respondents' motives and made factual

findings which were either unsupported or based on documentation disputed by oral testimony and reached findings of ultimate facts and conclusions that the documented events did not deny petitioner due process or prove that respondents had conspired to do so.

Respondents cite United States v. United States Gypsum Company, 333U.S.364,68 S.Ct.525,92L.Ed746(1948) as defining the scope of review.(B.4-5) In that case the government alleged conspiracy to violate the Sherman Act, introduced hundreds of documents and presented 28 witnesses. The defense introduced no evidence. This Court concluded that the trial court's findings were clearly erroneous and stated:

> The District Court did not accept the foregoing facts as definite evidence of a conspiracy. To us these facts are proof of a conspiracy. 333 U.S. at 389.
>
> * * *
>
> (T)he District Court concluded that only a lack of good faith by the defendants in the execution of what that Court considered legitimate exploitation of the patents could justify in this case a determination adverse to the defendants.

> The trial court held that an association of defendants in a common plan to organize the gypsum industry and stabilize prices through a network of patent licenses was legally permissible, and that in any event the government failed to prove that the defendants had associated themselves in such a plan. 333 U.S. at 391-392.

This Court noted, "declarations and acts of the various members, even though made or done prior to adherence of some to the conspiracy became admissible against all as declarations or acts of co-conspirators in aid of the conspiracy" 333 U.S. at 393, and explained the rationale for the scope of review:

> The practice in equity prior to the present Rules of Civil Procedure was that the **findings of the trial court, when dependent upon oral testimony where the candor and credibility of the witnesses would best be judged, had great weight with the appellate court. The findings were never conclusive, however, a finding is "clearly erroneous" when although there is evidence to support it, the reviewing court is left with the definite and firm conviction that a mistake has been committed.**333 U.S. at 395.(emphasis added)

In applying that rationale this Court noted:

> The government relied very largely on documentary exhibits, and called as witnesses many of the authors of the documents.
>
> * * *
>
> On cross examination most of the witnesses denied that they had acted in concert in securing patent licenses or that they had agreed to do the things that were in fact

done. **Where such testimony is in conflict with contemporaneous documents we can give it little weight, particularly when the crucial questions involved mixed questions of law and fact. Despite the opportunity of the trial court to appraise the credibility of the witnesses, we cannot under the circumstances of this case rule otherwise than that Finding 118 is clearly erroneous.** 333 U.S. at 395-396.(emphasis added)

This Court went on to conclude that numerous other findings were clearly erroneous and stated:

> The inference we draw from the uncontradicted evidence is that the defendants acted in concert to eliminate an important class of jobbers. 333 U.S. at 398.

Respondents cite: Inwood Laboratories, Inc. v. Ives Laboratories, Inc., 456 U.S. 844,102 S.Ct.2182,72L.Ed2d686(1982)(B.6) in which this Court stated Rule 52 does not apply to findings based on a mistaken impression of the law; United States of America v. National Association of Real Estate Boards, 339 U.S.485,70 S.Ct.711,94 L.Ed 1007(1950)(B.6), in which the government relied on ambiguous wording of fee schedules so the findings were not clearly erroneous; and United States v. Oregon State Medical

Society, 343 U.S.326,72 S.Ct.690,96L.Ed2d978 (1952)(B.6) in which the only proof of conspiracy within seven years were letters contradicted by many witnesses and it was held that without more proof of recent conspiracy there was no need for an injunction. In other cases, this Court has reversed after assessing the record and the law: United States v. E.I. DuPont de Nemours & Co., 353 U.S.586,77 S.Ct.872,1L.Ed.2d1057 (1957) which concluded the factual dispute was not significant so Rule 52 did not apply and that proof of a possibility of a prohibited restraint will not meet the legal requirement, but the effect of an acquisition "may be" such restraint and the facts demonstrated error; United States v. Parke, Davis & Co., 362 U.S.29,80S.Ct.503,4 L.Ed2d 505(1960) holding Rule 52 did not apply to finding that the Sherman Act was not violated based on misinterpretation of the law; United States v. General Motors Corporation, 384

U.S.127,86 S.Ct.1321(1966), holding the ultimate conclusion was not shielded by Rule 52 since the question was not factual but what legal standard should be applied to undisputed facts; United States v. Singer Manufacturing Co., 374 U.S.174,83 S.Ct.1773, 10L.Ed2d823(1963), holding the record compelled the conclusion that concerted activities were motivated by a common purpose and a contrary conclusion was clearly erroneous.

Respondents cite Anderson v. Bessemer City, 470 U.S.564,105 S.Ct.1504,84 L.Ed2d518 (1985) which stated that Rule 52 requires deference to findings based on oral testimony. 470 U.S. at 575, but noted:

> This is not to suggest that the trial judge may insulate his findings from review by denominating them credibility determinations, for factors other than demeanor and inflection go into the decision whether or not to believe a witness. Documents or objective evidence may contradict the witness' story; or the story itself may be so internally inconsistent or implausible on its face that a reasonable factfinder would not credit it. Where such factors are

> present, the court of appeals may well find error even in a finding purportedly based on a credibility determination. 470 U.S. at 575.

The record does not support respondents' astounding argument that credibility of witnesses was "extremely important", that "due regard must be given to the opportunity the trial court had to assess the credibility of the witnesses" and this is particularly true because petitioner admittedly altered medical records in an attempt to justify his actions and where his credibility has been called into question by other agencies reviewing his records and testimony while citing R.1142, 1407 and 1415. Petitioner acknowledged making additions to his office medical records on the gynecomastia cases in his trial testimony and in the hospital peer review proceedings. Affidavits and live testimony of the gynecocomastia patients and their families which corroborate the accuracy of the additions to the office records were part of the record of the hospital peer

review proceedings admitted as a documentary exhibit (Def.Ex.36). The written decision of the respondent board members criticizes making the additions and suggests further action might be taken. No other evidence was presented relative to this finding, and there is no evidence whatsoever of any standard or rule which prohibits making accurate additions to office records. The trial court ruled that testimony from these patients and their families would not be heard because the court could not rule on the quality of care. Counsel argued unsuccessfully that this testimony related to due process.(A.306-322) Respondents cite R.1142, 1407 and 1414 as establishing that petitioner's credibility has been questioned by other agencies. R.1142 is a reference to the 1983 amended complaint of the State Board of Medical Examiners which was dismissed. (A.473;933-934;Pet.26,32-33). R.1407 refers to a March 1978 letter from Dr. Stanley Baker of the

Upper Savannah Regional Audit Committee to Dr. Rowland of the PSRO reporting that 18 of 25 vagotomies performed by petitioner were not justified. The surgical committee at Bailey Memorial Hospital had rejected this proposed audit concluding that all the vagotomies were justified, criticizing the examiners for using inadequate records and disagreed that selective vagotomy was outside the realm of a community hospital. (A.1108-1109;Pet.9-12). R.1414 refers to minutes of the surgical committee dated March 4, 1987, which state that petitioner's honesty and integrity were questioned because he asserted that his patient, David Samples, had consumed clear liquids before discharge and that the patient and his wife had complained "as evidenced by sworn statements by the nursing staff and the fact that patient went to Dr. Marshall's office asking Dr. Marshall whether he was discharged prematurely." At trial Mr. and Mrs. Samples both testified that at the

time of discharge Mr. Samples was ready to go home, and had been drinking water and eating ice and that they had not complained. Mr. Samples testified that he had never been to Marshall's office. Mrs. Samples testified she had not been to Marshall's office in over four years, that Marshall had called her and asked if she was satisfied with her husband's care and said she had been to his office, and she informed Marshall that she had not been to his office. (A.553-559;562-569). On February 13, 1987, Marshall had written to the surgical committee stating in part:

> Mr. Samples and his wife came to my office after discharge from the hospital making inquiry concerning the appropriateness of his being sent home on the same day his nasogastric tube was removed without an adequate trial of diet. (A.1416)

On March 10, 1987, Marshall again wrote to the surgical committee and stated in part:

> As noted in my initial letter, the office visit referred to was informal in nature and I made no office records prior to referring the couple back to Dr. Toussaint. Having no such records to fall back on, I feel at this time compelled to write this additional letter to you stating that I cannot be 100% sure that in fact, David Samples and his wife were in

> my office at the end of December. It is certainly possible that my memory does not serve me in recalling the exact name of the family making inquiry at that time. (A.1412) (Marshall did not testify.)

Respondents contend that evaluation of credibility is of great importance because petitioner's character and veracity are questionable. The page limitation does not allow documentation of the testimony, but "live" testimony of respondents' witnesses does not support the findings but rather substantiates petitioner's claims despite denials of conspiracy. The findings appear to dispute the credibility of, doubt the veracity of and/or disregard the "live" testimony of petitioner's witnesses including patients, other physicians and a lawyer who impeach many documents prepared by respondents (Such witnesses were: Dr. Ross Pierpont (for whose veracity Dr. William Cantey vouched), Dr. Lawrence Hurst, Dr. Roy Suber, Cathey Sigman, John Ferguson, Jan Lever, Barbara Grant, Dr. Richard Carter, Sara

Pittman, Floyd Pittman, Dr. Joel Sexton, Catherine Stidham, Sylvia Arrowood, Glenda Dominick, Guianne Samples, David Samples and Dr. Terry Holdredge.) even though this "live" testimony of proper medical treatment, inappropriate discipline, lack of standards, solicitation of complaints, harassment of patients, false documentation of events by respondents, admissions of conspiracy, economic loss to petitioner and assassination of petitioner's character were neither disputed nor impeached by respondents' "live" witnesses. (A.245-285;291-298;00-308;322-361;419-445;491-512;531-569;786-789).

Respondents inaccurately argue that the findings are supported because an order of March 31, 1988, denied a motion to amend two findings. The trial court decision received wide publicity which followed publicity of the 1986 suspensions. Two findings were particularly damaging: (1) 18 of 25 vagotomies audited by the PSRO were unjustified and (2)

petitioner submitted altered medical records, represented as originals, at a peer review proceeding to justify his actions following a letter of November 12, 1986, pointing out deficiencies. A motion to amend these findings which were contrary to the record was made. The vagotomy audit was not done by the PSRO, and as aforestated this proposed vagotomy audit was rejected by the hospital. At a peer review proceeding, counsel, not petitioner, stated that there were "originals" and "copies" of the office records to be passed around, and when asked petitioner stated that the office records had been typed and expanded and that "everything in this is completely correct." (A.1700-1710) The letter of November 12, 1986, states that the charts were deficient because endocrine and psychological workups were not done. (A.1678-1679) Neither the hospital nor office charts contain such workups because they were not done. The physicians on the

committee authoring the letter do not do the procedure. All of the physicians who do the procedure testified that they do not do such workups and that the procedures were justified. (Pet.48)

2. The trial court erred in concluding that petitioner failed to sustain his causes of action for violations of 42 U.S.C. 1983.

Respondents argue that petitioner seeks to codify that a doctor must see a patient before examining a patient and must not falsify or alter medical records. (B.12) This is a gross misstatement of the record and petitioner's argument. Objective rules and standards are requirements of due process. Many physicians admit patients to hospitals and arrange for other physicians to examine them. If a hospital requires an admitting physician to examine a patient within so many hours of admission or before discharge, then it must make such a rule. If a hospital deems it inappropriate for a

physician to make accurate additions to office records before submitting them to a committee, then it must make a rule. If a hospital regulates surgical procedures, then it must establish criteria for the procedures.

Respondents contend petitioner is a constant source of difficulty citing R.1407, 1415 and 1421.(B.16) R.1407 and 1415 have already been described herein. R.1421 are minutes of the PSRO whose sanction was retroactively voided in 1983. (Pet.26-27) Respondents incorrectly state that Dr. Raymond Ramage taught petitioner and selectively quote from notes of a 1978 interview of Dr. Ramage citing R.1459.(B.17) Dr. Ramage did not teach petitioner, never observed him and the notes of that interview also state:

> Dr. Ramage was not in any contact with Dr. Toussaint but received reports from the various committees. Dr. Toussaint invariably was considered a good student with knowledge of medical literature.... Dr. Ramage stated that he was opposed to turning him out as a certified resident, but the surgical committee and the doctors representing overrode his decision.(A1459)

In 1977 and 1978 Dr. Ramage wrote virtually identical letters about petitioner to hospitals in Laurens and Spartanburg stating:

> During his residency I never had the opportunity to observe him at all in the care of patients and do not feel qualified to render a personal judgment in that matter. He did, from time to time, provide some administrative problems. I believe Dr. (Lawson) Stoneburner, who is the Acting Director of Surgery, has addressed his surgical ability...(A1452-1453)

Dr. Lawson Stoneburner wrote in 1976:

> This is to certify that Dr. Vincent Toussaint has completed a four year surgical residency program at the Greenville Hospital System. This is an approved residency and he has fulfilled the requirements for examination for the American Board of Surgery. **He spent his final year as chief surgical resident.** (A.1445)(emphasis added)

In 1978 Dr. Stoneburner wrote to Doctors Memorial Hospital in Spartanburg stating in part:

> There were times in Dr. Toussaint's early years of training when he demonstrated poor judgment and selection. As Acting Director of Surgery at the time most of these episodes were brought to my attention from others attending and were not necessarily my own opinions. I believe by the time Dr. Toussaint completed his training he had greatly improved in the above stated deficiencies. I will say that Dr. Toussaint was, and I presume still is an excellent surgical technician and with further time and mellowing will become an excellent

surgeon. He is undoubtedly highly intelligent and has completed his American Board of Surgery examination favorably.

I believe that Vince erred in going into a small community to perform the major surgery he was trained to do, where this type of surgery in many cases had never been performed before. It is my opinion he is making a wise move to go to a larger community to carry out his surgical practice. I personally feel that he has been somewhat maligned and harassed by our state PSRO and this is based on my review personally of the PSRO file concerning his problems.

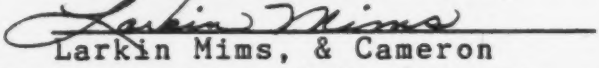
A surgeon of Dr. Toussaint's quality and training should be given the opportunity to continue with the practice he has trained for. I believe working in the environs of Spartanburg and your hospital will serve as an excellent method of monitoring his future performance... (A.1439-1440) (See Pet. 17-19)

Respondents' actions involved the board or were official policy decisions by persons to whom authority to establish policy had been delegated. See: Pembaur v. City of Cincinnati, 106S.Ct.89,89 L.Ed.2d452(1986)

CONCLUSION

Based on the foregoing and the petition, the writ of certiorari should be granted.

Respectfully submitted,



Larkin Mims, & Cameron Littlejohn, & R. Chastain

January 26, 1989